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# Ontario Human Rights Commission Policy Statement on Drugs and Alcohol Testing

Published November 1990  
Reprinted December 1991  
Disponible en français

 **Ontario**  
Human Rights Commission

ISBN: 0-7729-9773-X

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*PLEASE NOTE*

*These guidelines contain the Commission's interpretation of the Code provisions as they relate to alcohol and drug testing by employers before or after employment. They are subject to interpretation by boards of inquiry and the courts, and should be read in conjunction with the specific provisions of the Code. Any questions regarding this policy or the Code generally should be directed to the staff of the Ontario Human Rights Commission.*

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## POLICY ON DRUG AND ALCOHOL TESTING

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### DRUG OR ALCOHOL DEPENDENCY AS A DISABILITY

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Subsection 4.-(1) of the Ontario *Human Rights Code* (the *Code*) prohibits discrimination in employment on several grounds including "handicap".

The *Code* adopts an expansive definition of the term "handicap". Included are numerous physical and mental disabilities. The following examples represent ways in which the use of **legal and illicit** drugs or alcohol may fall within the *Code*'s definition of "handicap":

1. Where an individual's use of drugs or alcohol has reached the stage that it constitutes an addiction or dependency.
2. Where an individual is perceived as having an addiction or dependency due to drug or alcohol use.

Such a perception could be held by an employer without in fact being true. For example, an employer may interpret a positive test of a casual drug user to mean that the individual has a drug addiction or dependency. If the employer were to take action as a result of this inaccurate perception, the individual's right to equal treatment under the *Code* may have been infringed.

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### TESTING FOR DRUG AND ALCOHOL USE AS PART OF AN EMPLOYMENT-RELATED MEDICAL EXAMINATION

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Since the testing for alcohol or drug use would constitute a medical examination, the Commission's policy on Employment-Related Medical Information\* would be applicable. The main features of that policy are as follows:

1. Employment-related medical examinations or inquiries, conducted as part of the applicant screening process, are prohibited under subsection 22.-(2) of the *Code*.
2. Medical examinations should only be administered after a conditional offer of employment has been made, preferably in writing.
3. Any employment-related medical examinations or inquiries are to be limited to determining the individual's ability to perform the essential duties of a job. If the applicant or employee requires accommodation in order to enable him or her to perform the essential duties, the employer is required to provide such accommodation unless to do so would cause undue hardship.

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\* A copy of the Ontario Human Rights Commission Policy on Employee-Related Medical Information is available through any of the Commission offices.

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It is essential that drug testing, when performed, be done by qualified professionals and the results be analyzed in a competent laboratory. Further, it is the responsibility of the employer to ensure that the samples taken are properly labelled and protected at all times.

In order to protect the confidentiality of testing results, all health assessment information should remain exclusively with the examining physician and away from the worker's personnel file.

Procedures also should be instituted for the physician to review the testing results with the employee concerned.

If workers will be required to undergo drug and alcohol testing during the course of their employment - on the grounds that such testing, at the time that it is administered, would indicate actual impairment of ability to perform or fulfil the essential duties or requirements of the job, as opposed to merely detecting the presence of substances in the system - the employer should notify them of this requirement at the beginning of their employment.

In order to discern the necessity for testing, the following questions should be considered by employers, where applicable:

1. Is there an objective basis for believing that job performance would be adversely affected by the disability of drug or alcohol dependency?
2. In respect of a specific employee, is there an objective basis for believing that unscheduled or recurring absences from work or habitual lateness to work are related to alcoholism or drug addiction/dependency?

3. Is there an objective basis to believe that the degree, nature, scope and probability of risk caused by this addiction or dependency will adversely affect the safety of co-workers or members of the public?

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### ***DUTY TO ACCOMMODATE***

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Although the emphasis in the *Human Rights Code* is on ensuring that persons with disabilities are not treated in a discriminatory manner because of their disability, it is recognized that in some circumstances the nature and/or degree of a person's disability may preclude that individual from performing the essential duties of a job. Consequently, subsection 16.-(1) states that the right to equal treatment in respect of employment is not infringed where an individual is treated differently because he or she is incapable of performing or fulfilling the essential duties of the position because of handicap.

Subsection 16.-(1a) provides, however, that such a worker shall not be found incapable of performing the essential duties of a job unless it can be demonstrated that no appropriate accommodation exists, or that it would cause undue hardship to accommodate the worker's needs, taking into account the cost of the accommodation and health and safety concerns.\*

This means that if a worker's drug or alcohol addiction/dependency is interfering with that worker's ability to perform the essential duties

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\* Please refer to the Commission's Guidelines for Assessing Accommodation Requirements for persons with Disabilities for a detailed explanation of these standards. A copy of the guidelines is available through any of the Commission offices.

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of the job, the employer must provide the supports necessary to enable that worker to undertake a rehabilitation program unless he or she can show that such accommodation is not possible, e.g. the worker is refusing to undertake such treatment. The employer will also be relieved of the duty to accommodate the needs of the alcohol or drug addicted/dependent worker if the employer can show either that:

- the cost of the accommodation would affect the essence or viability of the enterprise or,
- notwithstanding accommodation efforts, health or safety risks to other workers or members of the public are still of such a serious degree that they outweigh the benefits of providing equal treatment to the worker with an addiction or dependency.

When considering how best to address the needs of workers with a drug or alcohol addiction/dependency, employers are encouraged to consider the establishment of an employee assistance program. Such a program can assist not only individuals with a drug or alcohol addiction/dependency, but can also help workers deal with the stresses which may lead to such an addiction or dependency.

These Guidelines contain the Commission's interpretation of the *Code* provisions as they relate to testing for drug and alcohol use. They are subject to interpretation by boards of inquiry and the courts, and should be read in conjunction with the specific provisions of the *Code*. Any questions regarding this policy or the *Code* generally should be directed to staff of the Ontario Human Rights Commission.

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